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MEMORANDUM FOR KEITH V. RESTAINO
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STAKEHOLDER PARTNERSHIPS, EDUCATION &
COMMUNICATION (W&I:SPEC)

FROM: Donald M. Suica
Chief, Public Contracts and Technology Law Branch (GLS)

SUBJECT: Re-obligation of De-obligated Low-Income Tax Clinic Grant Funds

This responds to the e-mail request of Debra Chandler, Grant Administration Analyst on your staff, concerning the Low-Income Tax Clinic (LITC) in Providence, Rhode Island (RI).

It also responds to the oral request of Jim Grimes, Director, Field Operations, Stakeholder Partnerships, Education and Communication (W&I:SPEC), at the first meeting of the Grant Administration Advisory Board, for general guidance on this issue. At that time, there was mention of the possible existence of outstanding balances, resulting from the de-obligation of grant awards, in prior year appropriation accounts. There also was a recounting of an understanding that it is the position of the office of the Chief Financial Officer that, after the lapse of the appropriations, they are unavailable for re-obligation.

More recently, Ms. Chandler inquired about this in the context of exploring the possibility of utilizing these balances as the source of supplementing the funding of the RI LITC. For reasons that follow, the general rule is that expired funds cannot be obligated. There are exceptions to this general rule. The RI LITC situation does not fit within any of these exceptions.

In decisions of the Comptroller General pertaining to the availability of prior year federal assistance appropriations for "new obligations," the facts of the individual case are very critical to the outcome. To respond to Ms. Chandler's inquiry, we summarize below the RI LITC situation. We rely on you or your staff to verify this statement of facts. (Some details were inferred on the basis of knowledge in general of the grant application process. The source of other details was oral advice. It would be prudent to review the files to verify dates, events, and correspondence that can be significant to the question what funds were, or are, available for obligation purposes.)

Prefacing the specific concern fact summary is a summary of appropriations laws in general, the law and legislative history relevant to LITC grants, and opinions of the Comptroller General where the general appropriations principles are discussed in the context of funds obligation issues that have arisen in federal grant programs. We hope this summary responds to the request for general advice. [redacted]

A summary of relevant laws and opinions:

I. Statutory Appropriation Obligation Requirements and Restrictions:

In general, appropriations should be obligated when grant agreements are executed. If grants are funded by appropriations that are limited for obligation purposes to a definite period of time, *i.e.*, they are not permanent indefinite appropriations or so-called "no-year" funds, the funds become unavailable for expenditures after the expiration of the period of availability.

These appropriation obligation rules are statutory. They are codified in 31 U.S.C. § 1501(a)(5)(B) and 31 U.S.C. § 1502(a), which respectively provide:

> An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of –
>
> . . .
>
> (5) a grant or subsidy payable –
>
> ...
>
> (B) under an agreement authorized by law ...;

and

> The balance of an appropriation of fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with ... [31 USC § 1501].

LITC grants are "payable ... pursuant to agreement authorized by ... law."

II. The Law and Legislative History Relative to LITC Grant Appropriations:

Section 3601(a) of the *Internal Revenue Service Restructuring and Reform Act of 1998*, P. L. 105-206, which became effective July 22, 1998, authorizes:

> ... subject to the availability of appropriated funds, ... grants to provide matching funds for the development, expansion, or continuation of qualified low-income taxpayer clinics.

IRC § 7526(a).

This enabling legislation includes a subsection that functions as a program funding allocation limitation unless it is modified by a later enacted specific appropriation provision:

> (c) Special rules and limitations –
>
> (1) Aggregate limitation – Unless otherwise provided by specific appropriation, the Secretary shall not allocate more than $6,000,000 per year (exclusive of costs of administering the program) to grants under this section.

IRC § 7526(c)(1).

The history of appropriations for LITC grants since the program's creation in July, 1998, is that, while specific sums for grants have been mentioned in reports pertaining to the Service's appropriations for the intervening years, it was not until Fiscal Year (FY) 2002 that an "earmarking" provision was included in the enacted appropriations law.

The FY 1999 appropriation was the first opportunity for funds to be appropriated for LITC grants after the program's creation in July, 1998. The Conference Report for the FY 1999 appropriation says:

> The conferees have ... provided $2,000,000 for low income taxpayer clinics. These funds will be used to award matching grants to develop, expand, or continue qualifying low income tax-payer clinics as authorized in Section 3601 of the Internal Revenue Restructuring and Reform act of 1998.

H.R. Conf. Rep. 825, 105th Cong., 1st Sess., at 1484 (1998).

The House Report for the FY 2000 appropriation said:

> The Committee has provided $2,000,000 for grants to low income taxpayer clinics, the same as the amount provided in fiscal year 1999 and $4,000,000 below the budget request. The Committee is aware that the IRS plans to award the first grants under this program in July of this year. Without any evidence of the effectiveness of this program, the Committee feels it would be inappropriate to triple its funding at this time.

H.R. Rep. 231, 106th Cong., 1st Sess., at 27 (1999). (There was no mention in the Conference Report of specific funding for LITC grants. *See* H.R. Conf. Rep. 319, 106th Cong., 1st Sess. (1999).) The non-binding effect of the above-quoted House Report provision, or the apparent modification of it, is evident from the following that appears in the House Report that accompanied the bill that became the FY 2001 appropriation:

> The level of funding provided includes $6,000,000 for low income tax-payer clinics, **the same level of funding that was provided in fiscal year 2000** and that is included in the budget estimate.

H. Rep. 756, 106th Cong., 2nd Sess., at 38 (2000) (emphasis added).

For FY 2002 there is a "specific appropriation" exception to the $6 million allocation limitation, IRC § 7526(c)(1). The Treasury and General Government Appropriations Act, 2002, P.L. 107-67, appropriated approximately $3.8 billion to the Service, "of which $7,000,000 shall be available for low-income taxpayer clinic grants." 115 STAT. 521 (Nov. 12, 2001).

Thus, in summary, the appropriations history of LITC grants is:

Fiscal Year	Amount	Reference
1999	$2 million	H.R. Conf. Rep. 825, 105th Cong., 1st Sess., at 1484 (1998)
2000	$6 million	H.R. Rep. 231, 106th Cong., 1st Sess., at 27 (1999), *but see* H. Rep. 756, 106th Cong., 2nd Sess., at 38 (2000)
2001	$6 million	H. Rep. 756, 106th Cong., 2nd Sess., at 38 (2000)
2002	$7 million	P.L. 107-67, 115 STAT. 521 (Nov. 12, 2001)

III. Comptroller General Opinions:

The general rule that funds are unavailable after their lapse and the explanation that this is a direct result of the statutory requirements of 31 U.S.C. §§ 1501 and 1502 is stated clearly in Cancer Research Institute, Los Angeles, 57 Comp. Gen. 205 (1978). This opinion is also noteworthy because it discusses at length some exceptions to this general rule.

The statement and explanation of the general rule is as follows:

> As a general rule, when a recipient of an original grant is unable to implement his grant as originally contemplated, and an alternate grantee is designated subsequent to the expiration of the period of availability for obligation of the grant funds, the award to the alternate grantee must be treated as a new obligation and is not properly chargeable to the appropriation current at the time the original grant was made. *See* B-164031(5), June 25, 1976. As that opinion states, this result follows pursuant to ... [31 U.S.C. §§ 1501 and 1502, formerly 31 U.S.C. § 200].

In amplification of this general rule, this decision also cites to another earlier, unpublished decision, Comp. Gen. Dec. B-114876 (1960), and offers a rationale in addition to the plain language requirements of 31 U.S.C. §§ 1501 and 1502.

> ... we considered the question of whether an alternate grantee designated to replace the original grantee, who became unable to implement the grant,

> could receive the award from the appropriation current at the time the original grant was approved or whether the appropriation current at the time the grant was made to the alternate is available. In our decision we advised ... that the award to the alternate grantee had to be recorded as an obligation against the appropriation current at the time the grant to the alternate grantee was executed. We explained our decision as follows:
>
> > The awards here involved are made to individuals based upon their personal qualifications. Whether the award is considered an agreement or a grant, it is a personal undertaking and where an alternate grantee is substituted for the original recipient, there is created an entirely new and separate undertaking. The alternate grantee is entitled to the award in his own right under the new agreement or grant and not on behalf of, on account of, or as an agent of, the original grantee. It seems clear that the award to an alternate grantee is not a continuation of the agreement with, or grant to, the original grantee executed under a prior fiscal year appropriation, but is a new obligation.

Next, this decision digests two other prior opinions and describes the first of the two as illustrative of:

> exceptions to this general rule.... [I]n B-157179, September 30, 1970, we advised the Attorney General that the unexpended balance of grant funds originally awarded to the University of Wisconsin could properly be used to engage Northwestern University in a new fiscal year to complete the unfinished project. Essentially, we took this position because the designated project director had transferred from the University of Wisconsin to Northwestern University and was viewed as the only person capable of completing the project. We also found that the original grant to the University of Wisconsin was made in response to a *bona fide* need then existing and that the need for completing the project continued to exist. Our decision in that case analogized the circumstances ... to the situation involving [federal acquisition, as distinguished from federal assistance] replacement contracts concerning which we take the position that the funds obligated under a contract are, in the event of the contractor's default, available in a subsequent fiscal year "for the purpose of engaging another contractor to complete the unfinished work, provided a need for the work, supplies, or services existed at the time of execution of the original contract and that it

> continued to exist up to the time of execution of the replacement contract." *See* 34 Comp. Gen. 239 (1954).

The second of the two decisions is interesting because it was in response not to an Executive Branch inquiry, but in reply

> ... to a Member of Congress, B-164031(5), June 25, 1976, disapprov[ing] a proposed transfer for a loan guarantee and interest subsidy from the Fort Pierce Memorial Hospital in Fort Pierce, Florida, to the Mount Sinai Medical Center located in Miami, Florida, after the expiration of the period of availability of the original fiscal year allotment from which the guarantee for the Fort Pierce Hospital had been made. Since the hospitals involved were located approximately 125 miles apart and served different communities, we conclude that the transfer to Mount Sinai would not be a "replacement" in the sense of a continuation of the original guarantee and subsidy to Fort Pierce. The Miami project, we held, "must be viewed as a new and separate undertaking."

After this round-up discussion of other opinions, some decided as falling within the general rule and others as exceptions, the Comptroller General in 57 Comp. Gen. 205 (1978) reasoned:

> the present case [where the issue was whether the University of Southern California could be substituted for Los Angeles County as the recipient of a grant to build a cancer research facility] is a clear example of ... the type of situation ... where the alternate proposal amounts to a replacement grant rather than a new and separate undertaking. First, the purpose of the instant grant appears to be the same as the original grant, *i.e.*, to construct a cancer research facility in the Los Angeles County area. .... [S]ince the ... facility will be constructed at essentially the same location as originally planned, albeit on land owned by the University rather than the County located no more than several hundred yards away from the original site, it will obviously serve precisely the same area .... Furthermore, the original strong need for the facility in the ... area continues to exist.
>
> Moreover, and perhaps most significantly, the original application that was submitted ... was filed jointly by both Los Angeles County and USC .... Had both the County and USC been named as grantees, the problem with which

we are now faced might have been resolved by a simple amendment of the approved grant application.

This opinion concludes, noting that the National Cancer Institute will "prior to deciding whether to make this award ... carefully review USC's application to assure itself that the two applications fulfill the same needs and purposes and are of the same scope," and then holds that, "We would have no objection to its approving the change in grantee ...."

While there are other opinions of the Comptroller General on this subject, we believe that 57 Comp. Gen. 205 (1978) is a mini-treatise on the issues that have been raised both as general-interest concerns and as specific to exploring the availability of de-obligated prior year balances to supplement the current grant to the RI LITC.

The RI LITC Statement of Facts:

1. On December 20, 2000, the Service notified the RI LITC of an award of a grant of $100,000 for calendar year 2001, obligating $100,000 of FY 2000 funds, and approved the clinic's proposal to be funded at that same level for the periods of calendar years 2001 and 2002 "subject to the availability of annual appropriated funds, satisfactory performance, and compliance with grant terms."

2. In FY 2001, the Service notified the RI LITC of an approval of the second year of its three-year "grant continuation" proposal. *See* LITC Grant Application Package and Guidelines *("Applicants approved for two or three-year project periods must submit a letter requesting continuation .... A decision to approve funding ... will be based on ... [a]vailability of annual appropiate[d] funds .... Grantees ... will be notified by the LITC Office regarding approval/disapproval of their request and the amount of their grant award."* Pub. 3319 (7-01), § IV(A)(4), pp. 15 - 16.) This resulted in the obligation of $100,000 of FY 2001 funds.

3. On October 28 and 29, 2001, the RI LITC Executive Director orally advised the LITC Grant Office that the clinic had been unable to comply with matching funds requirements. The gravity of this information was such that program staff and the clinic's Executive Director discussed the clinic's responsibility to return funds that had been previously awarded. It was also determined that it would be prudent to fund the continuation of the RI LITC, subject to the availability of annual appropriated funds and the clinic's conformity with the terms and conditions of LITC grants, including the matching funds requirement, IRC § 7526(c)(5), *see also* § 7527(a), in calendar year 2002 at $25,000, instead of $100,000, the maximum that may be

awarded to any clinic for a year, *see* IRC § 7526(c)(2). After the enactment of the FY 2002 appropriation, which did not occur until November 12, 2001, *see* P.L.107-67, 115 STAT 514, the Service in December of 2001 notified clinics nation-wide of the award of LITC grants for calendar year 2002. The Service obligated $25,000 of FY 2002 funds for the purpose of the RI LITC grant "continuation" in calendar year 2002.

4. Ms. Chandler paid a site visit to the RI LITC. In attendance were local government officials who expressed support for the clinic. Staff to Senator Reed of RI have also become involved. The clinic has a new executive director. There has also been a re-assessment or clarification of what constitutes matching funds and possibly "indirect expenses."[1] As a result of this re-evaluation, the RI LITC has requested that its current grant of $25,000 be increased to the maximum annual award of $100,000.

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[1]On this point, a quote of IRC § 7526(c)(5) is merited:

> A low-income taxpayer clinic must provide matching funds on a dollar-for-dollar basis for all grants provided under this section. Matching funds may include –
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> (A) the salary (including fringe benefits) of individuals performing services for the clinic; and
>
> (B) the cost of equipment used in the clinic.
>
> Indirect expenses, including general overhead of the institution sponsoring the clinic, shall not be counted as matching funds.

Guidance as to what are "indirect costs" and other related terms exists in OMB Circulars A-122, A-21, and A-110. They define "indirect costs" as those incurred for common or joint objectives, such as facilities and administration, and generally prohibit them from being counted as matching funds. There is specific guidance that while the services of volunteers, if integral to the services provided by the grantee, can be counted, they cannot be included if the volunteers are students whose service results in academic credit.

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Discussion:

We understand the issue to be whether de-obligated balances of prior year funds, that became available as a result of the inability of other clinics in past years to provide the services for which they had received LITC grants, can be re-obligated, using the fiscal year appropriations that were then obligated when those grants were awarded instead of the current 2002 appropriation. Furthermore, we understand that in December, 2001, 120 recipients, including the RI LITC, were notified of grant awards that, in total, obligated $6,998,948 of the $7 million that was appropriated in the Service's FY 2002 appropriation for the specific purpose of LITC grants.

As noted above, in fiscal years 1999 through 2001, the "earmarking" of funds for the specific purpose of LITC grants was in report language, rather than in the enacted legislation.

The Comptroller General has

> frequently expressed the view that subdivisions of an appropriation contained in the agency's budget request or in committee reports are not legally binding upon the department or agency concerned unless they are specified in the appropriation act itself.

Newport News Shipbuilding and Dry Dock Company, 55 Comp. Gen. 812 (1976) (*citing to decisions too numerous to include).* The Comptroller General has gone onto say that this is not to suggest that legislative history is immaterial. The Comptroller General recommends that agencies inform their oversight committees if decisions are made to use funds for purposes other than those noted in budget requests and reports. *Id.*

We mention this because the Grants Office needs to know not only what balances may exist on its program books. It also must coordinate with the Chief Financial Officer to learn if these "balances" may not have been "rolled up" and obligated for other purposes.

Assuming that there are prior year balances of sufficient amounts to increase the current $25,000 grant to the RI LITC to the amount requested ($100,000, an increase of $75,000), and assuming that these balances have retained their identity as having originating from the de-obligation of LITC grants and are still available, we do not believe that the facts of the RI LITC situation fit the exceptions that the Comptroller General has approved as exceptions to the general rule that expired funds cannot be obligated.

In making the determinations what grants to award, the Service is required to consider criteria listed in IRC § 7526(c)(4):

> ... the Secretary shall consider –
>
> (A) the numbers of taxpayers who will be served by the clinic, including the number of taxpayers in the geographical area for whom English is a second language;
> (B) the existence of other low-income taxpayer clinics serving the same population;
> (C) the quality of the program offered by the low-income taxpayer clinic, including the qualifications of its administrators and qualified representatives, and its record, if any, in providing service to low-income taxpayers; and
> (D) alternative funding sources available to the clinic, including amounts from other grants and contributions, and the endowment and resources of the institution sponsoring the clinic.

This is significant in light of the decision of the Comptroller General, mentioned above, Comp. Gen. Dec. B-164031(5), June 25, 1976, where in reply to a Congressional inquiry, it was determined that a proposed transfer for a loan guarantee from one hospital to another, 125 miles apart, but still within the State of Florida, could not be construed as a "replacement" in the sense of a continuation of the original guarantee and "must be viewed as a new and separate undertaking." The facts behind the RI LITC do not involve the transfer of a uniquely qualified executive director from one clinic to another, the serving of the same community *bona fide* needs that would have been served if the grants of previous years had been expended by the original grant recipients, or a joint grant submission.

[redacted]

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If you or others have any questions about this opinion, you should contact Dave Ingold in the Public Contracts and Technology Law Branch of General Legal Services by telephoning 202 283-7900.

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